of deportation need not be issued before Board order is reviewable).

2. Assuming that jurisdiction exists, the court of appeals correctly determined that the record in this case is not "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution" on the basis of political opinion. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 484 (1992). In *Elias-Zacarias*, the Court determined that an applicant for asylum must establish that he held a political opinion and that the persecutor's motive would be to harm him "*because of* that political opinion." *Id.* at 483. The Board's decision here hewed to that standard, concluding only that petitioners' evidence was too speculative, unconvincing, and insufficiently accurate and credible (Pet. App. A17-A18) to demonstrate a well-founded fear of persecution on the basis of political opinion. The court of appeals' affirmance found only that the record did not compel the contrary conclusion. *Id.* at A8-A12.

Petitioners contend (Pet. 14-22) that there is a division in the courts of appeals concerning what constitutes a political opinion or activity. That argument does not warrant review, for two reasons. First, petitioners do not challenge the court of appeals' alternative ruling (Pet. App. A12) that, even if Saldarriaga's attempt to cooperate with the DEA amounted to a protected political activity or opinion, Saldarriaga failed to establish that the drug traffickers would persecute him "on account of" that opinion. 8 U.S.C. 1101(a)(42)(A). Showing that nexus is essential to an asylum claim. See *Elias-Zacarias*, 502 U.S. at 482-483. Because resolution of petitioners' perceived conflict thus could have no effect on the outcome of this case, further review is not warranted.

Second, no such conflict exists in any event. The decisions on which petitioners rely do not reflect any divergence in the legal standards applied by the courts of appeals to review asylum determinations. They simply reflect that application of the same legal test to different facts and circumstances can yield different outcomes. In *De Brenner* v. *Ashcroft*, 388 F.3d 629 (8th Cir. 2004), and *Agbuya* v. *INS*, 241 F.3d 1224 (9th Cir. 2001) (cited at Pet. 16-17), the courts of appeals found aliens to be eligible for asylum not because those courts applied a different legal test than the court of appeals did here, but because each court concluded that the record in the case before it demonstrated that an alien's activities were political given the circumstances of the particular conflict.

In *De Brenner*, the Eighth Circuit determined that written threats by guerrillas showed that they imputed a political opinion to De Brenner because they "expressly named [her] as a member and supporter of the [ruling party], accused her family of supporting the government, and mistakenly singled her out as an actual worker for the [political party]." 388 F.3d 637. Indeed, the insurgents had "labeled Ms. De Brenner as a political enemy." *Id.* at 638. Likewise, in *Agbuya*, the court determined that particularized evidence demonstrated that a guerrilla group viewed Agbuya "as politically aligned with the mining company and the government, and against the [guerrilla group]," 241 F.3d at 1229, and "as an opponent of Communism," *id.* at 1230. Here, petitioners offered no comparable evidence

that narcotraffickers imputed any political affiliation to Saldarriaga.[3]

3. Petitioners also urge this Court (Pet. 23) to resolve a "split among the Circuit Courts of Appeals as to whether an imputed political opinion may form the basis of political asylum." But the court of appeals in this case did not hold that an imputed political opinion could not form the basis for an asylum claim, as petitioners concede. See Pet. 24 ("[T]he Fourth Circuit has not explicitly stated that an imputed political opinion may not form the basis for an asylum claim."). The court held only that the record in this case did not compel the Board to conclude that petitioners faced a well-founded fear of persecution on that basis. Pet. App. A12.

4. Petitioners contend (Pet. 32-35) that the court of appeals misapplied the burden of proof by requiring Saldarriaga to establish that he had a well-founded fear of persecution by a preponderance of the evidence.

The law is clear. "The burden of proof is on an applicant to establish her asylum claim." *In re S-M-J-*, 21 I. & N. Dec. 722, 724 (B.I.A. 1997); see *Elias-Zacarias*, 502 U.S. at 483-484. "[I]t is the alien who bears the burden of proving that he would be subject to, or fears, persecution." *In re Acosta*, 19 I. & N. Dec. 211, 215, 222 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The alien's "burden of persuasion" refers to the burden of "convinc[ing] the trier of fact of the truth of the allegations

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[3] Petitioners' reliance (Pet. 16-17) on *Lukwago* v. *Ashcroft*, 329 F.3d 157 (3d Cir. 2003), to demonstrate a conflict in the circuits on the definition of political opinion is misplaced because that case did not even involve an asylum claim based on political opinion. The decision in that case turned upon the statutory definition of a "particular social group." *Id.* at 170.

that form the basis of the claim for asylum or withholding of deportation." *Acosta*, 19 I. & N. Dec. at 215. "[T]he party charged with the burden of proof must establish the truth of his allegations by a preponderance of the evidence." *Ibid.* (citations and footnote omitted).

Petitioners' argument confuses the burden of proof, which petitioners unquestionably bear, with the legal standard by which they must prove their case—*i.e.*, a well-founded fear of persecution. To establish a well-founded fear of persecution, an alien must show that there is a "reasonable possibility" that he will be persecuted on account of a protected ground. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (citation omitted); *Mogharrabi*, 19 I. & N. Dec. at 445-446 (adopting a "reasonable person" test). That standard is lower than the "clear probability" standard governing withholding of removal. *Cardoza-Fonseca*, 480 U.S. at 431.

The Board's decision, which the court of appeals affirmed, recognized that petitioners needed to prove only a well-founded fear of persecution, Pet. App. A17, but concluded that petitioners had failed to make that showing, *id.* at A17-A18. In concluding that the record did not compel a contrary conclusion, the court of appeals did not alter either the established allocation of burdens of proof or the legal standard of a "well-founded fear of persecution" that petitioners are statutorily required to satisfy, 8 U.S.C. 1101(a)(42)(A). See Pet. App. A6, A8. Indeed, contrary to petitioners' argument (Pet. 34), nowhere did either the court of appeals or the Board require Saldarriaga to establish that it was more likely than not that he would be persecuted on account of a political opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-266

In The Supreme Court of the United States

APOLINAR PERAFAN SALDARRIAGA, LUZ VELASQUEZ CARMONA, ADRIANNA MENESES VELASQUEZ; MAURICIO PERAFAN VELASQUEZ, *Petitioners*,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-266

APOLINAR PERAFAN SALDARRIAGA, ET AL., PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REPLY STATEMENT OF THE CASE

The Solicitor General has materially misstated the facts of this case. The Solicitor General casts the facts to convey the misimpression that Mr. Perafan came to the United States and was left here without immigration status as a proximate result of the actions of Javier Cruz. This is not correct; Mr. Perafan was brought to the United States and abandoned here by the Drug Enforcement Administration (DEA).

The DEA obtained a visa for Mr. Perafan and his wife to come to the United States because the DEA asked Cruz, before it closed the DEA undercover operation in Colombia which Cruz ran, who would be in danger if they were left in Colombia. Cruz identified the Perafans. The DEA agents obtained visas for the Perafans because they feared that the narcotraffickers would retaliate against Mr. Perafan on account of their mistaken belief that he knowingly worked with the DEA's money laundering operation and provided intelligence to the United States government about narcotraffickers/insurgents. (App. 28-29).[1]

The Solicitor General is incorrect in his assertion that "Cruz fired Saldarriaga in a labor dispute." Once Mr. Perafan arrived in the United States, the DEA subsidized the operation of Cruz's restaurant, which was used as an undercover location by the DEA. The DEA fell out with Cruz, and Cruz fled from Roanoke to Miami, and then back to Colombia, to evade arrest. When Cruz left, the restaurant closed. When *The Roanoke Times* published the fact that Cruz was an undercover operative of the DEA, Mr. Perafan went to the DEA to see if he could receive assistance with his visa, but the DEA was not willing to help him because he did

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[1] References to the appendix refer to the appendix of the petition for writ of certiorari, which contains all of the opinions below.

not have any useful information about Cruz's illegal activity (App. 29-30).

The Solicitor General argues that the DEA agent who testified at trial said that Mr. Perafan is not likely to be harmed if he returned to Colombia, but on cross-examination the agent admitted that he did not know that Mr. Perafan's family had been threatened in Colombia (App. 48-49) and he acknowledged that Cruz had been killed when he returned to Colombia (App. 29). Based on this, the Immigration Judge found that it was "reasonable and plausible to believe that [Mr. Perafan's] persecutors targeted him because of his willingness to associate himself with Cruz and the DEA (App. 49)."

REPLY ARGUMENT

I. REVIEW SHOULD BE GRANTED BY THIS COURT TO DETERMINE WHETHER THE COURT OF APPEALS ACTED WITHOUT JURISCTION.

The Solicitor General argues that the Fourth Circuit acted without jurisdiction by reviewing the Board of Immigration Appeals' decision. The BIA reversed the immigration judge and remanded the case to the immigration judge to allow Mr. Perafan and his family to apply for voluntary departure. The Solicitor General argued below, and argues here, that the Board of Immigration's remand order was not a "final order" that was reviewable by the Court of Appeals.

The Fourth Circuit considered the government's jurisdictional argument and ruled that it would follow the Sixth,[2] Ninth,[3] and Eleventh[4] circuits which have already ruled that a BIA order denying relief from deportation, but remanding the case for voluntary departure proceedings, is immediately appealable.

However, the government still takes the position that "there is a substantial question whether the court of appeals had jurisdiction over petitioner's appeal," and this Court has not addressed the issue. This constitutes grounds for this Court to grant review in this case. Rule 10(c) of the rules of this Court states that a factor in granting a petition is that "a court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." The jurisdictional issue presented here--whether a BIA order denying relief from deportation, but remanding the case for voluntary departure proceedings, is immediately appealable to a court of

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2 *Perkovic v. INS*, 33 F.3d 615, 618-20 (6th Cir. 1994).

3 *Castrejon-Garcia v. INS*, 60 F.3d 135, 1361-62 (9th Cir. 1995).

4 *Del Pilar v. United States*, 326 F.3d 1154, 1156-57 (11th Cir. 2003)(per curiam).

appeals--should be resolved by this Court and is ripe for review.

II. THERE IS A SPLIT AMONG THE CIRCUITS AS TO WHETHER A GOVERNMENT INFORMANT MAY BE ENTITLED TO POLITICAL ASYLUM.

The Solicitor General argues that there is no split among the Circuit because, even though the Eighth and Ninth Circuits have reached different results as to what constitutes political opinion under this Court's decision in *INS v. Elias-Zacarias*,[5] all of the Courts of Appeal have applied the legal test stated in *Elias-Zacarias* that an asylum applicant must show that he held a political opinion and that he would be persecuted " because of that political opinion."[6]

It is true that all of the Courts of Appeals have attempted to follow *Elias-Zacarias*, but the courts have defined "political" differently and, as a result, have reached different results in similar cases. This Court should address what "political" means in the asylum context.

For example, the Courts of Appeals disagree as to whether acting as an informant constitutes political activity. The Ninth Circuit, in *Briones v.*

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5 502 U.S. 478, 484 (1992).

6 *Id.* at 483.

INS,[7] and the Seventh Circuit, in *Fadul v. INS*,[8] have stated that acting as a government informant may support a claim based on political opinion even if the informant is not motivated by political belief. Yet the Fourth Circuit has ruled in this case that an applicant is not entitled to political asylum unless "he is motivated by an ideal or conviction of sorts (App. A9)," and takes "action which is grounded in principle, inspired by altruism, or intended to advance a cause (App. A10)." There is a significant difference between the Circuits as to what constitutes political opinion.

III. THERE IS A SPLIT AMONG THE CIRCUITS AS TO WHETHER AN IMPUTED POLITICAL OPINION MAY FORM THE BASIS OF POLITICAL ASYLUM.

A root cause of the different results reached by the Courts of Appeals in applying the *Elias-Zacarias* test is the divergence of opinion as to whether an imputed political opinion may form the basis of political asylum.

In *Elias-Zacarias*, this Court did not address whether an asylum seeker must actually hold the political opinion for which he is being persecuted, or whether the mere belief by the persecutors that the

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7 175 F.3d 727 (9th Cir. 1999).

8 210 F.3d 374 (7th Cir. 2000).

victim held an adverse political opinion would be sufficient. The Court left this question of imputed political opinion open.

The government's argument here illustrates the problem. The Fourth Circuit below focused on Mr. Perfan's subjective motivation: whether he held a political opinion contrary to the narcotraffickers. Since the Fourth Circuit defined political so as to require Mr. Perafan to have a political motivation, it found that there was no evidence in the record that he would be persecuted on account of a political opinion. However, the Ninth Circuit's definition of political does not require that the applicant display a political opinion, but focuses on the motivation of the persecutors. Under the Ninth Circuit's definition of "political," the alien in *Agbuya v. INS*,[9] who during the course of her employment at a mining company took actions which the local communist party considered to be contrary to the interest of laborers, was entitled to political asylum because the communists threatened to retaliate against her, even though there was no evidence that she held a political opinion adverse to the communists.

There is a difference between the circuits as to whether *Elias-Zacarias* requires that the asylum applicant prove that he actually holds a political opinion or whether it is enough that the persecutor impute a political opinion to him. Today, the difference between the circuits causes different outcomes in similar cases. If Mr. Perafan lived in

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9 241 F.3d 1224 (9th Cir. 2001).

one of the states in the Ninth Circuit, he would have been entitled to asylum because the narcotrafficker/ insurgents believe that he cooperated with the United States government in what the narcotrafficker/insurgents consider to be a political struggle against them and the insurgents will retaliate against Perafan because of his imputed cooperation with the United States government.

This Court should grant review to state whether imputed political opinion may be a basis for political asylum.

IV. THE FOURTH CIRCUIT APPLIED THE BURDEN OF PROOF IN A MANNER WHICH IS NOT CONSISTENT WITH THE OTHER CIRCUITS.

The Solicitor General argues that the BIA did not require Mr. Perafan "to establish that it was more likely than not tht he would be persecuted on account of a political opinion." This is wrong. The basis of the BIA decision was that "we find that the respondent has not provided evidence sufficient to meet his burden of demonstrating that he is more likely than not" that he would be persecuted (App. A18-19). By affirming the BIA decision, the Fourth Circuit has failed to follow this Court's decision in *INS v. Cardozo-Fonseca* that "an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country."[10]

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10 502 U.S. at 487.

The Fourth Circuit, along with the First, Second, Third, Eighth, Eleventh Circuits, and the BIA[11] has now held that an alien must meet a preponderance of the evidence standard, even though this Court held otherwise in *Cardozo-Fonseca*, although the Seventh, Ninth, and Tenth Circuits,[12] have held that an alien must merely meet a burden of producing some evidence of persecution on account of an enumerated ground, so as to establish eligibility for asylum, and the Attorney General may then exercise discretion as to whether to grant asylum. Under that standard, Mr. Perafan would have been entitled to political asylum.

This Court should grant review to resolve this split between the circuits.

CONCLUSION

FOR THE REASONS stated herein the petitioners pray that this Court will grant this petition and review the decision of the United States Court of Appeals for the Fourth Circuit.

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11 The relevant cases from these courts are cited at pages 32-33 of the petition for writ of certiorari.

12 The relevant cases from these courts are cited at page 32-33 of petition for writ of certiorari.